

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL
WITH PROOF
OF SERVICE

77-6022

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

by DOROTHY S. GREENBERG,

for herself as well as for the United States of America,

Plaintiff-Appellee,

Plaintiff-Relator-Appellant,

—against—

THE BURMAH OIL COMPANY LIMITED, BURMAH OIL INCORPORATED, BURMAH OIL TANKERS LIMITED, BETHEL MARINE, INC., SOUTHHOLD MARINE, INC., VERMONT MARINE, INC., BURMAST EAST SHIPPING CORP., BURMAH GAS TRANSPORTATION LIMITED, ELIAS J. KULUKUNDIS, SUMMITT MARINE OPERATIONS, INC., SUMMITT I, INC., SUMMITT II, INC., SUMMITT III, INC., CHEROKEE I SHIPPING CORPORATION, CHEROKEE II SHIPPING CORPORATION, CHEROKEE III SHIPPING CORPORATION, CHEROKEE IV SHIPPING CORPORATION, CHEROKEE V SHIPPING CORPORATION, ENERGY TRANSPORTATION CORPORATION, C. Y. CHEN, JOSEPH J. CUNEO, JEROME SHELBY, CRYOGENIC ENERGY TRANSPORT, INC., LNG TRANSPORT INC., LIQUEGAS TRANSPORT INC., JAMES DURBIN, JOHN C. BULLITT, FIRST NATIONAL CITY BANK, CITICORP LEASING, INC., GENERAL AMERICAN TRANSPORTATION CORP., GENERAL DYNAMICS CORPORATION, CITIMARLEASE (BURMAH I), INC., CITIMARLEASE (BURMAH LNG CARRIER), INC., CITIMARLEASE (BURMAH LIQUEGAS), INC., and CITICORP,

Defendants-Appellees.

REPLY BRIEF OF APPELLANT DOROTHY S. GREENBERG



Of Counsel:

RICHARD B. DANNENBERG
FRANK NEWMAN
BURTON L. KNAPP
AARON LIPPER
STEPHEN LOWEY

LIPPER, LOWEY & DANNENBERG and
BURTON L. KNAPP

747 Third Avenue
New York, New York 10017
(212) 759-1504

—and—

NEWMAN, SHOOK & NEWMAN, P.C.
4330 Republic National Bank Building
Dallas, Texas 75201
(214) 747 9091

*Attorneys for Plaintiff-Relator-Appellant
Dorothy S. Greenberg*

TABLE OF CONTENTS

	PAGE
 POINT I--	
There Has Never Been a Judicial Determination of the Legality of the Structure of the Transactions Which Are the Subject of the Complaint. Absent Binding Legal Precedent, the Department of Justice Can Not Be the Prosecutor, Judge and Jury and Unilaterally Determine that the Alleged Fraud Should Not Be Thoroughly Aired and Judicially Reviewed by Virtue of Relator's <i>Qui Tam</i> Suit Maintained at Relator's Expense	5
 POINT II--	
Relator Is a Bona Fide Informer Who Has Rendered a Valuable Service. Her Conduct and This Action Are of the Very Type That Congress Intended to Encourage in Enacting the 1943 Amendments to the False Claims Act	9
 POINT III--	
The Appellees' Contention That the Government at the Time That Relator Filed Her Suit Was in Possession of All the Essential Information Is Sharply in Dispute. That Factual Issue Should Not Have Been Summarily Determined but Should Have Been Determined After a Hearing in the Course of the Prosecution of the Action Itself	14
CONCLUSION	16
 ADDENDUM--	
Letter of August 19, 1976, of Congressman Les Aspin	A1

Cases:

<i>Arfons v. E.I. Du Pont de Nemours & Co.</i> , 261 F.2d 434 (2d Cir. 1958)	2n
<i>Baretze v. Barnett</i> , — F.2d — (2d Cir. April 14, 1977, Dkt. No. 76-7406)	2n
<i>Chappell & Co. v. Frankel</i> , 367 F.2d 197 (2d Cir. 1966)	7
<i>Commerce Reporting Co. v. Puretec, Inc.</i> , 290 F. Supp. 715 (S.D.N.Y. 1968)	2n
<i>Electric Bond & Share Co. v. S.E.C.</i> , 303 U.S. 419, 58 S.Ct. 678, 82 L.ed. 936 (1938)	6
<i>Federal Maritime Commission v. De Smedt</i> , 366 F.2d 464 (2d Cir. 1966), <i>cert. den.</i> , 385 U.S. 974 (1966)	7
<i>Friends of the Earth v. Carey</i> , 535 F.2d 165 (2d Cir. 1976)	9n
<i>Heyman v. Commerce and Industry Insurance Company</i> , 524 F.2d 1317 (2d Cir. 1975)	14
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803).....	8
<i>Meacham Corp. v. United States</i> , 207 F.2d 535 (4th Cir. 1953), <i>cert. dismissed</i> , 348 U.S. 801 (1953)	6
<i>United States v. Armour & Co.</i> , 146 F. Supp. 546 (D.D.C. 1956), <i>aff'd</i> , 254 F.2d 90 (D.C. Cir. 1958)	12
<i>United States v. Aster</i> , 176 F. Supp. 208 (E.D. Pa. 1959), <i>aff'd</i> , 275 F.2d 281 (3rd Cir.), <i>cert. denied</i> , 364 U.S. 894 (1960)	9n
<i>United States ex rel. Bayarsky v. Brooks</i> , 154 F.2d 344 (3rd Cir.), <i>cert. denied</i> , 329 U.S. 716 (1946)	13
<i>United States ex rel. Davis v. Long's Drugs, Inc.</i> , 411 F. Supp. 1144 (S.D.Cal. 1976)	10n

	PAGE
<i>United States ex rel. Leslie v. Potomac Electric Power Co.</i> , 208 F.2d 39 (D.C. Cir. 1953)	12
<i>United States ex rel. Anthony R. Martin-Trigona v. Ford</i> , Civil Action No. 76-1374 (D.D.C. October 28, 1976)	13
<i>United States ex rel. McCans v. Armour & Co.</i> , 146 F. Supp. 546 (D.D.C. 1956), <i>aff'd per curiam</i> , 254 F.2d 90 (D.C. Cir.), <i>cert. denied</i> , 358 U.S. 834 (1958)	13
<i>United States ex rel. McLaughlin v. American Chain & Cable Co.</i> , 62 F. Supp. 302 (S.D.N.Y. 1945)	12, 13
<i>United States v. Nixon</i> , 418 U.S. 683, 94 S.Ct. 3090, 41 L. ed. 2d (1039) (1974)	8
<i>United States v. Pittman</i> , 151 F.2d 851 (5th Cir. 1945), <i>cert. denied</i> , 328 U.S. 843 (1946)	13
<i>United States v. Rippetoe</i> , 178 F.2d 735 (4th Cir. 1949)	14
<i>United States ex rel. Sherr v. Anaconda Wire & Cable Co.</i> , 57 F. Supp. 106 (S.D.N.Y. 1944), <i>aff'd</i> , 149 F.2d 680 (2d Cir.), <i>cert. denied</i> , 326 U.S. 762 (1945)	12

TABLE OF AUTHORITIES

Statutes:

31 U.S.C. § 232(B)	9
31 U.S.C. § 232(C)	8n, 9
31 U.S.C. § 233	8n
46 U.S.C. § 802	3

Other Authorities:

89 Cong. Rec. 7570-7616 passim (1943)	10
89 Cong. Rec. 10746-51 (1943)	10n

	PAGE
89 Cong. Rec. 10752 (1943)	10
S. Rep. No. 291, 78th Cong., 1st Sess. (1943)	9
U.S. Code Congressional Service 2.324-6 (1943)	9
Federal Rules of Evidence 801(d)(2)	11n-12n
<i>Other:</i>	
<i>Alice's Adventures in Wonderland</i> , Chapter III	5

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

by DOROTHY S. GREENBERG,

for herself as well as for the United States of America,

Plaintiff-Relator-Appellant,

—against—

THE BURMAH OIL COMPANY LIMITED, BURMAH OIL INCORPORATED, BURMAH OIL TANKERS LIMITED, BETHEL MARINE, INC., SOUTHHOLD MARINE, INC., VERMONT MARINE, INC., BURMAST EAST SHIPPING CORP., BURMAH GAS TRANSPORTATION LIMITED, ELIAS J. KULUKUNDIS, SUMMITT MARINE OPERATIONS, INC., SUMMITT I, INC., SUMMITT II, INC., SUMMITT III, INC., CHEROKEE I SHIPPING CORPORATION, CHEROKEE II SHIPPING CORPORATION, CHEROKEE III SHIPPING CORPORATION, CHEROKEE IV SHIPPING CORPORATION, CHEROKEE V SHIPPING CORPORATION, ENERGY TRANSPORTATION CORPORATION, C. Y. CHEN, JOSEPH J. CUNEO, JEROME SHELBY, CRYOGENIC ENERGY TRANSPORT, INC., LNG TRANSPORT INC., LIQUEGAS TRANSPORT INC., JAMES DURBIN, JOHN C. BULLITT, FIRST NATIONAL CITY BANK, CITICORP LEASING, INC., GENERAL AMERICAN TRANSPORTATION CORP., GENERAL DYNAMICS CORPORATION, CITIMARLEASE (BURMAH I), INC., CITIMARLEASE (BURMAH LNG CARRIER), INC., CITIMARLEASE (BURMAH LIQUEGAS), INC., and CITICORP.,

Defendants-Appellees.

RELATOR-APPELLANT'S REPLY BRIEF*

The Government concedes in its Brief that since late 1972 it has paid some \$79 million for construction differential

* The Government served its Appellee's Brief untimely by mail on May 3, 1977, received May 4th. It had served a printer's proof on April 29th. See the Order of this Court of April 25th. The private defendant-appellees had served a Joint Brief on April 22, 1977, pursuant to Scheduling Order No. 3.

subsidies ("CDS"); that these payments have been made in connection with and under three applications filed on July 14, 1972, with MarAd (amended on August 31, September 15 and 20, 1972 [A280-330]) and approved by MarAd on September 22, 1972; that the applications and payments are in connection with the construction of three LNG tankers being built by the defendant-appellee General Dynamics Corporation for the defendant-appellee Burmah Oil Tankers Limited ("BOT") and its parent company, defendant-appellee The Burmah Oil Company Limited ("Burmah"). [The Government's Brief re "The Cryogenic applications," at pp. 8 to 10 thereof.]

The Cryogenic applications, in connection with the Easco Transaction, is one of the two alleged fraudulent transactions challenged by Relator's Complaint, on the ground that deliberately false citizenship affidavits were submitted to the Government in support of the applications (Complaint ¶¶ 22, 24, 25, 29, 31 to 34 and 40 to 44). [A11, *et seq.*]*

As to the Cryogenic applications, the appellees do not address themselves to the underlying factual issue, i.e., whether Burmah, "by any . . . means whatsoever" con-

* In view of the conceded actual payment by the Government of \$79 million in CDS financing, the appellees' arguments (not presented to the Court below) that the Relator's complaint is legally insufficient with respect to Title XI guarantees with respect to the two transactions, because a guarantee is not a "claim" within the meaning of the False Claims Act, is of no moment. It is well established that a complaint may not be dismissed for legal insufficiency if on any state of facts as alleged, the complaint states a claim for relief. *Arfons v. E. I. Du Pont de Nemours & Co.*, 261 F.2d 434 (2d Cir. 1958); *Commerce Reporting Company v. Puretec, Inc.*, 290 F. Supp. 715 (S.D.N.Y. 1968). Further, no motion for legal insufficiency was presented to the District Court and is therefore not properly before this Court. *Baretze v. Barnett*, — F.2d — (2d Cir. April 14, 1977, Dkt. No. 76-7406). Of course Relator does not concede the validity of appellees' arguments.

trolled or was permitted to exercise control over the applicants for the CDS financing in the summer and fall of 1972, when the applications were filed and approved. [See Section 2(b)(d) of the Shipping Act of 1916 as amended, 46 USC § 802(b)(d)]

Despite the denials by the defendant-appellees of Burmah's control, the Relator's position is confirmed by documentary evidence. See the proposal from Burmah's subsidiary, BOT, to Japan Lines Limited for the formation of a transportation joint venture, dated May 29, 1975 (A553-571), pertinent excerpts from which are set forth at pp. 59 to 62 of Relator's Main Brief, dated March 31, 1977. In that proposal Burmah affirms its control over the construction, financing and use of the eight tankers being constructed, including the three vessels which are the subject of the Cryogenic applications.*

That the private defendant appellees may have structured the financing through a trustee arrangement would not preclude the existence of control by Burmah. Substance controls over form. See Relator's March 31st Brief, pp. 55-57.**

In 1975, the White House apparently inquired as to the validity of these Cryogenic applications. Assistant Attorney General Leon Ulman, in his opinion of April 9, 1975 in response (A481-488), obviously strained to justify their validity. He cited no judicial precedent and he ignored Burmah's control:

* Burmah projects an annual net income of \$54.8 million to \$65.3 million from the operation of the eight LNG tankers (A570).

** Relator alleges in her complaint that as part of the conspiracy Messrs. Kulukundis, Chen and Durbin caused stock of the applicants to be transferred to an Owner-Trustee. Complaint ¶¶29 through 32 (A15-18).

"It would appear that as to the particular transaction addressed herein the Secretary did assure himself that the operation and control of the vessels in question would remain the responsibility of the bareboat charterer, an American citizen as defined in the Shipping Act, 1916. Moreover he assured that the time charterer, the ultimate user, was a corporation organized under the laws of the United States, albeit not a citizen under the Shipping Act of 1916" (A 487).

In short, he skirted the real issue as to whether substance should control over form.* See pages 6-8 *infra*. Now the Government once again has unilaterally determined that there was no fraud. Relator finds this to be incredible in light of the documentary evidence in this Record, including the statements in the Kurrus Memorandum attributed to MarAd's Administrator (A48-49).

* Assistant Attorney General Ulman did not have the benefit of Burmah's admissions. See the Kurrus Memorandum and the May 29, 1975 proposal (A47-49; 553-574); nor did he have any of the other documents or information submitted by Relator.

POINT I

There Has Never Been a Judicial Determination of the Legality of the Structure of the Transactions Which Are the Subject of the Complaint. Absent Binding Legal Precedent, the Department of Justice Can Not Be the Prosecutor, Judge and Jury and Unilaterally Determine that the Alleged Fraud Should Not Be Thoroughly Aired and Judicially Reviewed by Virtue of Relator's Qui Tam Suit Maintained at Relator's Expense.

"I'll be judge, I'll be jury," said cunning old Fury;
 "I'll try the whole cause, and condemn you to death."
Alice's Adventures in Wonderland, Chapter III

After the filing of this action the United States Attorney for the Southern District of New York apparently conducted an investigation and advised General Counsel for MarAd on January 17, 1977 "... we have concluded that the facts of which we are aware do not justify the initiation of criminal or civil proceedings for violation of the citizenship requirements of the False Claims Act." Relator does not know upon what facts or upon what law the foregoing conclusion was based and the Government in its Brief does not assist in this regard.

With respect to the Cryogenic applications, Burmah considered itself the controlling entity (A553-574); and Mr. Blackwell of MarAd apparently acknowledged that "the structure" of the financing was based on a "fiction" and "he Blackwell . . . recognized the weakness in the theory as to how these deals were established and that this is what worried him about a full fledged legal controversy between Burmah and Energy" (A49). However you label the structuring of the transaction, *e.g.*, leveraged lease financing, if in fact Burmah is the controlling entity, and the citizenship affidavits submitted to MarAd failed to dis-

close this fact (as they did), then it is difficult to understand how legal CDS financing could have been approved in 1972 and \$79 million legally paid out thereunder. The appellees cite no judicial authority to sustain the legality of the structuring of the deal and the fictions, however complex, engaged in.

The Court of Appeals for the Fourth Circuit has cautioned that in interpreting the definition of United States citizen for purposes of Section 2 of the Shipping Act, the Court must look through form to substance. In *Meacham Corp. v. United States*, 207 F.2d 535 (4th Cir. 1953), cert. dismissed, 348 U.S. 801 (1953) the Court wrote:

"We are not embarrassed by the difficulty that sometimes confronts the courts of deciding whether the separateness of a corporate entity from its stockholders should be observed. That difficulty has been solved by the explicit direction of Congress that for the purpose of the statute a corporation is not a citizen of the United States, if its citizen shareholders hold their *stock under any trust or obligation in favor of aliens, or if by any understanding or any means whatsoever control is permitted to be exercised by any person not a citizen of the United States*. We are therefore compelled to observe the substance rather than the form of the transaction 207 F.2d at 543." (emphasis in original.)

The Supreme Court in *Electric Bond & Share Co. v. S.E.C.*, 303 U.S. 419, 440, 58 S.Ct. 678, 82 L.ed. 936, 947 (1938), appositely rejected the use of formalistic devices in attempts to escape proscriptions or applications of federal statutes:

"It is the substance of what they do, and not the form in which they clothe their transactions, which must afford the test. The constitutional authority confided

to Congress could not be maintained if it were deemed to depend upon the mere modal arrangements of those seeking to escape its exercise. Compare *Northern Securities Co. v. United States*, 193 U.S. 197."

And the Court of Appeals for this Circuit has written in *Chappell & Co. v. Frankel*, 367 F.2d 197, at p. 202 (1966):

"This Court is not sympathetic to arguments that seek to have statutes interpreted on the basis of literalness, irrespective of purpose. As was said by Judge L. Hand in *Cawley v. United States* (272 F.2d 443, 445, 2d Cir. 1959), ' * * * unless (the statute's words) explicitly forbid it, the purpose of a statutory provision is the best test of the meaning of the words chosen * * * ' (see *Federal Maritime Comm'n v. DeSmedt*, 2d Cir. 1966; *Eck v. United Arab Airlines*, 360 F.2d 804, 812, 2d Cir., 1966)."

and in *Federal Maritime Commission v. DeSmedt*, 366 F.2d 464 (2d Cir. 1966), *cert. den.* 385 U.S. 974 (1966) at pp. 469-470 wrote:

"Respondents' 'plain meaning' approach has long since ceased to have this court's adherence; Judge Learned Hand was not preaching novel doctrine when he instructed more than twenty years ago: 'There is no surer way to misread any document than to read it literally.' *Guiseppi v. Walling*, 144 F.2d 608, 624 . . . (1944) (concurring opinion), *aff'd sub nom. Gemsco Inc. v. Walling*, 324 U.S. 244 . . . (1945) Courts of the United States are not, like Elsa in the Lohengrin legend, forbidden to ask whence something sprang; on the contrary, they are bound to seek out the source of a critical sentence of a statute, as we have recently done in *F.M.C. v. Caragher*, *supra*. 'Where the mind labors to discover the design of the legislature, it

seizes everything from which aid can be derived,' Marshall, C.J., in *United States v. Fisher*, 2 Cranch (6 U.S.) 358, 386, 2 L.Ed. 304 (1805). Such inquiry is particularly necessary when a literal reading produces an anomalous result; . . .".

Even if, after the filing of this action, new citizenship affidavits with respect to the Cherokee applications were obtained (as apparently happened) (Government's Brief, p. 23) and that transaction has been recast, those new affidavits could not cure the 1972 alleged false affidavits in connection with the Cryogenic applications under which \$79 million has been paid to date.*

Relator respectfully submits that under our constitutional form of government which separates the executive, legislative and judicial branches into three separate branches for purposes of appropriate checks and balances, only the judiciary can be the final determiner of the legality of the complex factual allegations pleaded in Relator's Complaint (never before scrutinized by the judiciary). Yet if the appellees, including the Government, have their say, the transactions will never be scrutinized by the judiciary in an objective setting. Such would constitute a usurpation of the constitutional function of the judiciary in violation of bedrock principles established long ago in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) and recently reaffirmed by the Supreme Court in *United States v. Nixon*, 418 U.S. 683, at 704 (1974):

" . . . it is the province and duty of this Court to say what the law is . . . " **

* The January 19, 1977 Release from the Department of Commerce relates to the Cherokee Applications as recast and amended—not the Cryogenic applications.

** Contrary to what appellees argue, Congress did intend that the Federal Court supervise how the Government conducts itself under the False Claims Act, 31 U.S.C. §§ 232(C), 233.

POINT II

Relator Is a Bona Fide Informer Who Has Rendered a Valuable Service. Her Conduct and This Action Are of the Very Type That Congress Intended to Encourage in Enacting the 1943 Amendments to the False Claims Act.

The 1943 amendments to the False Claims Act were intended "to protect and compensate genuine informers who comply with the provisions respecting notice to the Attorney General" (S. Rep. No. 291, June 8, 1943, U.S. Code Congressional Service 2.324-6 (1943)). Congress made it clear that it intended to encourage a private citizen to bring and prosecute such a suit and that such a person as relator was not to be considered a trouble-maker.*

The False Claims Act expressly permits a taxpayer at his or her expense to file an action for fraud (31 USC §232(B)); to carry on such suit "if the United States shall fail, or decline . . ." to do so; or "if the United States fails to carry on such suit with due diligence . . ." (31 USC §232(C)). Nor must the Relator's information be "based upon information, evidence and sources original" with the taxpayer. See Relator's March 31st Brief, pp. 42 to 46.

The Government, urging that "parasitical" actions were not the only actions intended to be excluded, at pages 25-26 of its Brief, refers to the limited legislative history with respect to the Conference Committee Report, which amended the Senate's version.** However, the Government

* Compare, *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976).

** The Government also relies on the District Court's summary in *U.S. v. Aster*, 176 F. Supp. 208 at 209-210 of the Senate debates

fails to state that that Conference Committee Report deleted from the Senate's version that language which would have prohibited actions based upon unoriginal information.

As finally enacted, jurisdiction fails if "it shall be made to appear that such suit was based upon evidence or information in the possession of the United States." The Committee had deleted from the Senate's version the following italicized language:

"based upon information, evidence *and sources original with such person*".

Thus, as discussed in Relator's Main Brief, the initial Senate's version of the amendments would have required the information to be "original" with a relator. But this requirement was deleted. Congress was more concerned about frauds which would go unprosecuted by the Government and did not want to place too great an obstacle to a suit by a taxpayer, particularly when such suit would be prosecuted at the taxpayer's expense and not the government's. 89 Cong. Record 7570 to 7616 *passim*.

Relator must have touched a sensitive nerve among the private defendant-appellees. What else could justify their vicious attack upon an innocent taxpayer, accusing her of "seeking a substantial bounty," of providing the Government "with copies of certain documents—some public, some apparently purloined" and of plagiarizing other documents.

at 89 Cong. Record 10746-51. But a reading of those pages does not support that Court's conclusion. See also *United States ex rel. Davis v. Long's Drugs, Inc.*, 411 F. Supp. 1144, 1152 (S.D.Cal. 1976).

There is absolutely no record evidence that Relator or her counsel "purloined" documents.* Further, Relator has not copied from any Government complaint, indictment, investigation, hearing, transcript, report, or any other writing or sources original with the Government. Her information did not come from any documents prepared by or for the Government, or from information she or her counsel was aware the Government possessed. And very little of her information came from newspaper articles. Nor is it unusual to use a legal memorandum for purposes of drafting a complaint.

To the contrary, Relator, through her counsel, acquired, compiled and organized information and evidence of an alleged fraud perpetrated upon the United States, strongly suggesting the complicity of certain Government officials. Concededly, a portion of the same information compiled by Relator and her counsel now appears to have been scattered among various agencies of the Government; but at the time this action was filed that information had not been organized and compiled by either the legislative or executive branch of the Government, or any agency thereof. In addition, Relator furnished the Kurrus Memorandum which is an essential link in the chain of facts underlying the alleged fraud;** and lastly, this action has been a

* In oral argument before Judge Knapp in the District Court, certain of the appellees' counsel gratuitously, without substantiation, charged that the documents were "purloined"; but the District Court properly disregarded such scandalous and unsubstantiated comments. Further, the source of Relator's information is irrelevant, provided it does not emanate from within the Government itself. Appellees did not claim below that Relator's evidence and information came from sources within the Government.

** Relator also furnished three additional documents never before in the possession of the Government. See her Main Brief and the footnote at pages 32-33 thereof. Further, the Kurrus Memorandum would be admissible into evidence as an admission. Federal Rules

catalyst in bringing the very issues to confrontation. One may only conjecture as to how slowly the wheels of Government would have turned, if at all, had the suit not been filed on September 30th, and had Relator not furnished the ten documents or sets thereof, listed on Schedule A to the Complaint. The filing of the action was also intended to insure that the facts of the alleged fraud would have a judicial airing.

In interpreting the False Claims Act, the Courts have quickly disposed of the "parasitic" type of lawsuit where the relator has merely copied the work product of a Government agency. *United States ex rel. Sherr v. Anaconda Wire & Cable Co.*, 57 F. Supp. 106 (S.D.N.Y. 1944), *aff'd*, 149 F.2d 680 (2d Cir. 1945) [suit started two days after Grand Jury indictment, relator copied newspaper account]; *United States ex rel. McLaughlin v. American Chain & Cable Co.*, 62 F. Supp. 302 (S.D.N.Y. 1945) [all material information was elicited prior to suit by the Department of Justice from hearings held by a Congressional Committee and a portion was the subject of a prior Federal Trade Commission complaint].

Further, where the relator was a former government employee who used information already in possession of the Government, the suit was dismissed. *United States v. Armour & Co.*, 146 F. Supp. 546 (D.D.C. 1956), *aff'd*, 254 F.2d 90 (D.C. Cir. 1958).

But before a suit will be dismissed, it must be established that the Government has *all* the information. *United States ex rel. Leslie v. Potomac Electric Co.*, 208 F.2d 39 at p. 40. (D.C. Cir. 1953) ["As plainly appears from our

of Evidence, Rule 801(d)(2). The New York Times articles would not be. Nor, under the circumstances of this case, would the attorney-client privilege presumably be a bar.

recital of the pertinent circumstances, all of the information upon which the suit was based '. . . was in the possession of the United States . . . , at the time suit was brought'"]; *United States ex rel. McLaughlin v. American Chain & Cable Co.*, 62 F. Supp. 302 at p. 303 (S.D.N.Y. 1945). [" . . it is abundantly clear that all the material information for the suit was elicited by the Government, before the Relator filed suit . . . from hearings held by the House of Representatives Committee on Naval Affairs . . ."]; *United States of America ex rel. Anthony R. Martin-Trigona v. Ford*, Civil Action No. 76-1374 (D.D.C. October 28, 1976).

"All plaintiff's information here comes from the Federal Election Commission and from a newspaper article which had been examined by the Commission staff. In fact, this same information led to an administrative complaint which was filed at the same time as this action and is now pending before the Commission. Plaintiff here alleges no facts or information not otherwise known to the Government and in its possession. Neither did he make the Government more aware of the value of the information already possessed. Thus, this Court has no jurisdiction under the False Claims Act."]

And where there is fraud and the Government chooses to intervene and prosecute the action, the suit will not abate even if the Government was in possession of the essential information at the time of a relator's suit. The Government is given the opportunity to establish the fraud. *United States ex rel. Bayarsky v. Brooks*, 154 F.2d 344 (3d Cir. 1946), *cert. denied* 329 U.S. 716 (1946); *United States v. Pittman*, 151 F.2d 851 (5th Cir. 1945), *cert. denied* 328 U.S. 843 (1946).

Here, the Government has chosen not to prosecute this Action. Before it is dismissed, any doubt should be resolved against the Government and in favor of the taxpayers.

POINT III

The Appellees' Contention That the Government at the Time That Relator Filed Her Suit Was in Possession of All the Essential Information Is Sharply in Dispute. That Factual Issue Should Not Have Been Summarily Determined but Should Have Been Determined After a Hearing in the Course of the Prosecution of the Action Itself.

The Government's notice of motion to dismiss does not state under which section of Rule 12 of the Federal Rules of Civil Procedure the Government was moving (A263). Irrespective thereof, the Government's voluminous affidavits and exhibits raise sharp issues of fact which should not have been disposed of summarily. *Heyman v. Commerce and Industry Insurance Company*, 524 F.2d 13 (2d Cir. 1975); *United States v. Rippetoe*, 178 F.2d 735 (4th Cir. 1949).

In its moving papers, the Department of Justice uncandidly tries to give the impression by the affidavit of Calvin B. Kurimai, sworn to November 26, 1976 (A496-497) that the Department of Justice moved expeditiously to investigate the matter upon receipt of Congressman Aspin's letter of complaint under date of August 19, 1976. But the fact is that some 48 days later, under date of October 7, 1976, when Assistant Attorney General Thornburgh acknowledged Congressman Aspin's letter, he made no mention of any Department of Justice Investigation or having possession of any of the documents which were

furnished by Relator. He referred only to the fact that that Department was going to make inquiry from the Federal Maritime Administration and the Securities and Exchange Commission (A522).

Nor did the Department of Justice candidly advise what the House Committee on Government Operations was doing. All we know from the Government's moving papers was that at some time prior to September 30, 1976, that Committee received copies of certain documents which Relator also furnished the Government (A494-495). The letter of inquiry from the United States Attorney's Office in the Southern District of New York is under date of October 22nd and the Committee's response is under date of November 29th. For all we know that Committee received the documents on September 29th, one day before the Relator filed her complaint. Certainly Congressman Brooks in the press release and his letters of August 2nd and 3rd 1976 (A221-223) did not indicate that that Committee had had the documents listed on Schedule A to Relator's complaint. Thus, it may very well be that all of the facts as to what information the Government really had and what investigations were already occurring on September 30th were not candidly brought forth in the Government's moving papers.

Of course, Relator has had no discovery in this action and has had no opportunity to cross-examine the Government on the issue. Particularly in the circumstances of this action, where if this action is not permitted to proceed an alleged major fraud, well documented and pleaded with specificity, will be permitted to continue, a hearing should have been had, in the interest of justice and in the interest of the American taxpayer. At the very least this Court should remand for findings of fact after an appropriate hearing on the jurisdictional issues.

CONCLUSION

To date the Government has paid out \$79 million in subsidies which are benefiting a United Kingdom company, which company stands to profit handsomely from its operation of the eight LNG tankers involved in this action.

The Government, instead of welcoming this action in the interests of all taxpayers, for reasons undisclosed, has concluded that there was no fraud and seeks to have this action summarily terminated.

The appellees can point to no Government document or proceeding copied by Relator; it nonetheless would have this Court affirm the dismissal because some, but not all, the information or evidence was latently in the possession of the Government, albeit not organized and strewn through several agencies, some apparently acting, prior to September 30th, independently of the other.

If the appellees' arguments are adopted by this Court, considering the vastness of the Government, it will be easy to prevent the judicial airing of alleged frauds upon the Government, should the Executive Branch of the Government, for reasons best known to itself, choose not to prosecute. Such was not intended by Congress and certainly is not in the best interest of the American taxpayer.

The judgment below should be vacated and the order of dismissal reversed.

Dated: New York, New York
May 6, 1977

Respectfully submitted,

LIPPER, LOWEY & DANNENBERG and
BURTON L. KNAPP
747 Third Avenue
New York, New York 10017
(212) 759-1504

—and—

NEWMAN, SHOOK & NEWMAN, P.C.
4330 Republic National Bank
Building
Dallas, Texas 75201
(214) 747-9091

*Attorneys for Plaintiff-Relator-
Appellant Dorothy S. Greenberg*

Of Counsel:

RICHARD B. DANNENBERG
FRANK NEWMAN
BURTON L. KNAPP
AARON LIPPER
STEPHEN LOWEY

ADDENDUM

A1

Letter of August 19, 1976, of Congressman Les Aspin

CONGRESS OF THE UNITED STATES

HOUSE OF REPRESENTATIVES

Washington, D.C. 20515

August 19, 1976

Honorable Edward Levi
Attorney General of the U.S.
U.S. Department of Justice
Washington, D.C.

Dear Mr. Attorney General:

Today the *New York Times* reported that several federal agencies are investigating the application of the Burmah Oil Company for Title XI mortgage insurance guarantees for the construction of 8 LNG tankers at General Dynamics, Quincy, Mass. facility.

According to the *New York Times*, a memorandum of law prepared by a firm acting for one of Burmah's subsidiaries flatly states that affidavits of corporate citizenship submitted to the Maritime Administration "were fraudulent."

If this information is accurate, it surely constitutes prima facie evidence that some parties may be involved in an effort to obtain Title XI guarantees through fraud.

I am writing to you today to request that the Department of Justice undertake an immediate investigation of any possible fraud in connection with this case. It is obvious that we cannot tolerate anyone under any circumstances providing the Maritime Administration with fraudulent information.

A2

Letter of August 19, 1976, of Congressman Les Aspin

I am also enclosing an exchange of correspondence I have had with Mr. Robert Blackwell, Administrator of the Maritime Administration on this matter, and additional data which I provided to Chairman Jack Brooks of the House Government Operations Committee.

Let me thank you in advance for your cooperation in this matter.

Sincerely,

LES ASPIN
Member of Congress

LA/bkc/Enc.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

Stephen Ketz, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 55 E 10th ST
New York New York 10003.

That on the 6th day of MAY, 1977,
deponent personally served the within REPLY BRIEF OF APPELLANT DOROTHY
S. GREENBERG
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed~~
~~in a postpaid properly addressed wrapper, in the post office~~
~~or official depository under the exclusive care and custody~~
~~of the United States post office department within the State~~
~~of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses

ROBERT B. FISKE, JR.
United States Attorney for the Southern District of New York
Attorney for Plaintiff-Appellee
One St. Andrew's Plaza
New York, N. Y. 10007

Stephen Ketz

Sworn to before me this

6th day of MAY, 19 77.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

ERUAN Oquendo, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 5616
NEW UTRACHT AVE.

That on the 6th day of MAY, 1977,
deponent personally served the within REPLY BRIEF OF APPELLANT DOROTHY
S. GREENBERG

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing _____ true copies of same enclosed~~
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
Attorneys for Defendants-Appellees Summit Marine Operations, Inc.,
Summit I Inc., Summit II, Inc., Summit III, INC., Cherokee I
Shipping Corporation, Cherokee II Shipping Corporation, Cherokee III
Shipping Corporation, Cherokee IV Shipping Corporation, Cherokee
V Shipping Corporation, Energy Transportation Corporation, C. Y.
Chen, Joseph J. Cunec, Jerome Shelby, Cryogenic Energy Transport,
Inc., LNG Transport Inc., Liquegas Transport Inc.
345 Park Avenue
New York, N. Y. 10022

Ernan Oquendo

Sworn to before me this

6th day of MAY, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

RANDALL T. HAKMS, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 5 UNIVERSITY PL.
Rm. 806 New York, NY. 10003.

That on the 6 day of May, 1977,
deponent personally served the within REPLY BRIEF OF APPELLANT DOROTHY
S. GREENBERG
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed~~
~~in a postpaid properly addressed wrapper, in the post office~~
~~or official depository under the exclusive care and custody~~
~~of the United States post office department within the State~~
~~of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses

DONOVAN LEISURE NEWTON & IRVINE
Attorneys for Defendant-Appellee
General Dynamics Corporation
30 Rockefeller Plaza
New York, N. Y. 10020

Randall T. Hakms

Sworn to before me this

6th day of MAY, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

James Ratliff, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 2 Charlton St.
New York NY 10014

That on the 6th day of MAY, 1977,
deponent personally served the within REPLY BRIEF OF APPELLANT DOROTHY
S. GREENBERG

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing 2 true copies of same enclosed~~
~~in a postpaid properly addressed wrapper, in the post office~~
~~or official depository under the exclusive care and custody~~
~~of the United States post office department within the State~~
~~of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses

CAHILL GORDON & REINDEL

Attorneys for Defendants-Appellees Citicorp, Citibank, N.A.,
Citicorp Leasing Inc., Citimarlease (Burmah I), Inc., Citimarlease
(Burmah LNG Carrier), Inc. and Citimarlease (Burmah Liquegas), Inc.
80 Pine Street
New York, N. Y. 10005

SIMPSON THACHER & BARTLETT

Attorneys for Defendants-Appellees The Burmah Oil Company Limited,
Burmah Oil Incorporated, Burmah Oil Tankers Limited, Bethel Marine,
Inc., Southhold Marine, Inc., Vermont Marine, Inc., Burmah Gas
Transportation Limited
One Battery Park Plaza
New York, N. Y. 10003

(For other names, see attached list)

Sworn to before me this

6th day of MAY, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930903
Qualified in Queens County
Commission Expires March 30, 1979

James Ratliff

HUGHES HUBBARD & REED
Attorneys for Defendant-Appellee General American Transportation Corp.
One Wall Street
New York, N. Y. 10005

NATHANIEL R. RUVELL
Attorney for Defendant-Appellee Elias J. Kulukundis
One World Trade Center
Suite 5215
New York, N. Y. 10048

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
Attorneys for Defendant-Appellee John C. Bullit
120 Broadway
New York, N. Y. 10005

Counsel Press, 55 West 42nd Street, PE 6-8460
(6315)